Office-Supreme Court, U.S.
FILED
NOV 2 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-475

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAUGHLIN RECREATIONAL ENTERPRISES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND OBJECTION TO GOVERNMENT'S EX PARTE SUBMISSION OF EVIDENCE

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INTRODUCTION

The Government's Brief in Opposition is a disservice to this Court:

- It ignores the rationale of *Kirby Forest Indus., Inc. v. U.S.* (1984) ____US____, 81 L Ed 2d 1.

- It seeks to examine each of the Government's actions in *isolation*, rather than analyzing their *combined* effect on the subject property.
- It improperly seeks to place hearsay evidence (which is not part of the trial court record) before this Court without even supplying the Petitioner with a copy of what it lodged.

The Government's Brief in Opposition demonstrates a need to grant the Petition so the Government may be informed of the limits of its power. Obviously, it refuses to learn from *Kirby*.

KIRBY DEMONSTRATES A NEED FOR FURTHER CONSIDERATION BY THIS COURT OR REMAND TO THE COURT OF APPEALS

The Government's assertion that the Court of Appeals properly applied *Kirby* (br. in Opp., p 3) is plainly in error.

In *Kirby*, this Court expressed grave concern with the treatment accorded those whose property is being condemned for the greater public good, and noted:

> "*If* petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, *we would find its constitutional argument compelling.*" (*Kirby*, ___ US at ___, 81 L Ed 2d at 13; emphasis added.)

The facts at bench go beyond *Kirby*. As the District Court plainly acknowledged:

> "It is not that I don't share the property owner's view that tieing up the property this way

all this time is detrimental, *there is no question it is detrimental.*" (RT 368; emphasis added.)

"And, *all this does create an economic hardship* and does reduce the value of the land to the landowner. There is no question about it. But, it seems to me that this is a policy question. You are attempting to get around the hardships of the policy by interest and I don't think we can do that." (RT 370-371; emphasis added.)

"I don't know exactly — I don't want the record to be erroneous here; I don't say that I have in mind a specific injury or specific dollar amounts for Mr. Laughlin. But, I can see, *having tied up all this property all this time, he has suffered some economic injury.* We don't have in the record what this is." (RT 375; emphasis added.)

In addition, there was the use of criminal sanctions to prevent Laughlin's agents from going on Laughlin's property or to test drill on Laughlin's property. To add insult to injury, the agents' visits were needed to obtain evidence of ground water levels for trial. This was Government interference with the judicial process and an attempt to deny a fair trial.

Consideration of the facts by this Court will flesh out the *Kirby* rule by explaining what governmental actions *do* lead to liability. At a minimum, full consideration by the Court of Appeals (rather than summary affirmance without analysis) seems in order.

ALL THE FACTS MUST BE CONSIDERED TOGETHER TO DETERMINE THEIR IMPACT

This Court has been unable to determine any set formula for evaluating the impact of governmental actions on property to determine whether compensation is Constitutionally compelled. Rather, the totality of the circumstances has been examined to determine the impact. (E.g., *Ruckelshaus v. Monsanto Co.* [1984] ___ US ____, 81 L Ed 2d 815, 834 [collecting numerous cases].)

The Government ignores this rule.

Rather than examining the collective impact of the totality of its actions, the Government prefers to examine each in isolation, concluding that none — considered by itself — requires compensation. (Br. in Opp., pp 3-6)

That sort of baloney-slicing technique is precisely what this Court has repeatedly said is wrong. Apparently the Government needs another express message to keep its sliced baloney out of court.

OBJECTION TO EX PARTE SUBMISSION OF HEARSAY EVIDENCE NEVER PROFFERED TO THE DISTRICT COURT

Apparently feeling some concern that the record in this case leaves it vulnerable, the Government has lodged with this Court its "incident report" and a map of the "area involved." (Br. in Opp., p 6, fn 8)

That ex parte submission of self serving hearsay is submitted to "prove" that the property owner's agents were cited for trespassing on Government land, not on the subject property.

But the offers of proof (and the actual citations which were lodged with the District Court) show otherwise. They show that the Government exercised dominion over the subject property *before* trial by citing the property owner's expert witness for trespassing *on the subject property* and destroying a natural feature by drilling to determine the depth of the water table *on the subject property.*

The Government's "incident report" is not only hearsay, it is contrary to the offers of proof made in the District Court. Please recall that it was the Government's objection that kept this issue from being fully tried below. It is outrageous overreaching by the Government to attempt to fill this Government-created void by supplying inadmissible hearsay at this level.

Moreover, the Government failed even to display sufficient ethical courtesy to serve a copy of its submission on Petitioner's counsel. That disables Laughlin from analyzing the report.

This issue is one for trial in the District Court after remand. For now, the record is what it is, per the rejected offer of proof.

Petitioner objects to the submission and its consideration at this time. Petitioner suggests this further Government attempt to deny a fair hearing deserves sanctions.

CONCLUSION

The Government refuses to face reality.

Its actions unconstitutionally injured Petitioner.

Further consideration of the issues raised in *Kirby* is deserved.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 1, 1984, I served the within *Reply Brief in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

Kathleen P. Dewey
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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1,1984, at Los Angeles, California.

Sharon Stewart
(Original signed)